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No. 84-1249

In the Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE C. NORRIS, SR. AND
BARRY SILVER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether Section 239(b)(2) of the National Housing Act, 12 U.S.C. 1715z-4(b)(2), prohibits the misuse of income derived from property in which the Department of Housing and Urban Development holds a mortgage that is in default.

2. Whether, under the Due Process Clause, legal uncertainty, if any, regarding the proper construction of 12 U.S.C. 1715z-4(b)(2) barred prosecution of petitioners.

3. Whether 12 U.S.C. 1715z-4(b)(2) unconstitutionally delegates legislative authority to the executive branch.

4. Whether the evidence is sufficient to support petitioners' convictions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 749 F.2d 1116. The opinion of the district court (Pet. App. 27a-57a) denying petitioners' motion for a judgment of acquittal or for a new trial is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1984. The petition for a writ of certiorari was filed on February 4, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioners were convicted of several offenses arising out of their misuse of funds in connection with a defaulted real estate mortgage held by the Department of Housing and Urban Development (HUD). Both petitioners were convicted of conspiring (1) to misuse income derived from a federally-insured housing project while the mortgage for that project was in default, in violation of 12 U.S.C. 1715z-4(b)(2), and (2) to make false statements in connection with a matter within the jurisdiction of a federal agency, in violation of 18 U.S.C. 1001, all in violation of 18 U.S.C. 371. Petitioner Norris was also convicted on 15 counts of substantive violations of 12 U.S.C. 1715z-4(b)(2) and one count of a substantive violation of 18 U.S.C. 1001. Petitioner Silver was also convicted on five counts of substantive violations of 12 U.S.C. 1715z-4(b)(2). Petitioner Norris was sentenced to 1190 days' imprisonment, to be followed by three years' probation upon his release from confinement. Petitioner Silver was sentenced to 360 days' imprisonment, to be followed by three years' probation upon his release from confinement. The court of appeals affirmed (Pet. App. 1a-26a).

1. Petitioner Norris has been a real estate entrepreneur in the Tidewater Section of Virginia for more than 20 years.[1] Petitioner Silver was the comptroller of Norris Realty, a sole proprietorship owned by petitioner Norris which served as the managing

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[1] The statement of facts is taken from the opinions of the court of appeals and district court and from the government's brief in the court of appeals.

agent for Shamrock Gardens Apartments, a 74-unit apartment complex in Chesapeake, Virginia, owned by petitioner Norris and his partners in the Shamrock Gardens Partnership. Pet. App. 3a. The apartment complex was subject to a regulatory agreement between the partnership and HUD that governed the operation of the complex, including the distribution of income derived from the project during a period of default. The Federal National Mortgage Association (FNMA) held the mortgage on the property, which HUD insured. *Id.* at 4a.

During May 1976, due to the partnership's failure to maintain its monthly mortgage payments, FNMA declared the Shamrock Gardens' mortgage in default and sought relief from HUD (Pet. App. 4a). HUD subsequently paid the balance of the mortgage to FNMA, which then assigned the Shamrock Gardens mortgage to HUD (*id.* at 4a-5a). HUD then began to negotiate with petitioners to reschedule their payment of the partnership's indebtedness. During those negotiations, which continued into 1979, HUD informed petitioners on several occasions that they could disburse funds from the Shamrock Gardens account only for the necessary operating expenses of the apartment complex during the period that the partnership was in default. *Id.* at 5a-6a; C.A. App. 330-331, 1015-1022. HUD also directed petitioners to submit monthly financial statements and yearly audited financial reports on the status of the project to HUD. C.A. App. 1015-1022.

Notwithstanding these restrictions, Shamrock Garden funds were disbursed for petitioner Norris' personal use on numerous occasions during this period. For instance, during August 1977 petitioner Norris pledged $10,000 of Shamrock Garden's funds as col-

lateral for a personal loan. After he failed to repay the loan, the lendor foreclosed upon the $10,000 that he had pledged as collateral (C.A. App. 430-432). On another occasion, petitioner Norris used $10,000 of Shamrock Garden's funds to purchase an option on a different apartment complex. That money was also lost when petitioner Norris failed to exercise his option (C.A. App. 452-455). In addition, petitioner Norris used $8,560 of the apartment complex's funds to pay the Internal Revenue Service for taxes on a different business in which he owned an interest (C.A. App. 401). See also Gov't C.A. Br. 8-13. At the same time, petitioners frequently failed to supply HUD with audited financial reports on the apartment complex, and several of the reports that were forwarded to HUD contained false statements regarding the distribution of funds from the Shamrock Gardens account. When HUD finally took control of Shamrock Gardens, it was over $400,000 in arrears.

2. The court of appeals affirmed petitioners' convictions (Pet. App. 1a-26a). Relying upon the language of the statute (*id.* at 8a-12a), the court rejected petitioners' claims that 12 U.S.C. 1715z-4(b)(2) is limited to mortgages insured, rather than held, by HUD, is unconstitutionally vague, and improperly delegates legislative authority to HUD. The court reasoned (Pet. App. 9a-11a) that the text of the statute was clear and unambiguous, did not require supplementation by HUD in the form of regulations, and applied to mortgages held by HUD as well as to mortgages that HUD insures. The court also found the evidence sufficient to support petitioners' convictions (*id.* at 12a-18a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioners claim (Pet. 20-29) that Section 239 (b) (2) of the National Housing Act, 12 U.S.C. 1715 z-4(b) (2), applies only to mortgages that are insured by HUD and excludes mortgages that have been assigned to HUD following the mortgagor's default. Under that construction of the statute, once the Shamrock Gardens mortgage had been assigned by FNMA to HUD, petitioners argue, the mortgage was no longer "insured" by HUD and was thus exempt from the statute. For several reasons, petitioners' construction of the statute is flawed.

As the court of appeals correctly observed (Pet. App. 8a-9a), the text of the statute provides the starting point for determining its scope. See, *e.g.*, *United States* v. *Turkette*, 452 U.S. 576, 580 (1981). Section 239(a), 12 U.S.C. 1715z-4(a), provides that the Secretary of HUD may not consent to an extension of the payment period or a modification of the terms of a mortgage covering "multifamily housing" (as defined by regulation [2]) except as provided by regulation. That Section also compels the Secretary to issue regulations requiring a mortgagor to hold in trust any income derived from the mortgaged property that is unnecessary "to meet actual and neces-

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[2] The Secretary's regulations define "multifamily housing" as "new housing accommodations * * * on the mortgaged property, designed principally for residential use, conforming to standards satisfactory to the Commissioner [of Housing], and consisting of not less than five rental dwellings on one site." 24 C.F.R. 207.24(a).

sary expenses" during the extension or modification period. Section 239(b) enforces the provisions of Section 239(a) by making it a crime for the owner of the property (or other specified persons) secured by a multifamily housing mortgage to engage in either of two different types of activity: Subsection (b)(1) makes it unlawful for a person willfully to use or authorize the use of any surplus income derived from that property in violation of the regulations issued by the Secretary under Section 239(a); subsection (b)(2), the provision at issue in this case, complements subsection (b)(1) by making it a crime willfully and knowingly to divert surplus funds from a mortgage that is "*not otherwise covered by such regulation*" if that mortgage goes into default (emphasis added).

Petitioners maintain (Pet. 23-27) that Section 239(b) is limited to mortgages that are insured by HUD because Section 239(a) is limited in that manner.[3] But that argument overlooks the differences between subsections (b)(1) and (2). Subsection (b)(1) is limited to insured mortgages because that provision makes it a crime to violate only a "regulation prescribed by the Secretary under [Section 239(a)]," and the pertinent regulation applies only to insured mortgages (see page 6 note 3, *supra*). By contrast, subsection (b)(2) refers to any mortgage "not other-

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[3] Although 12 U.S.C. 1715z-4(a) does not in terms refer to "insured mortgages," the implementing regulation effectively limits that Section in this manner. See 24 C.F.R. 207.256b. That regulation authorizes a mortgagor and mortgagee to agree upon an extension or modification "with the approval of the [Federal Housing] Commissioner." The regulation thus applies only in those cases in which HUD is not the mortgagee and the mortgage is still held by a private party.

wise covered by such regulation." Because mortgages that are held by HUD are "not otherwise covered by [the] regulation" dealing with insured mortgages, a mortgage, like the Shamrock Gardens mortgage, that has been assigned to HUD by the mortgagee is within the scope of subsection (b)(2). Thus, when the two subsections are read together, it is clear that 18 U.S.C. 1715z-4(b) covers mortgages that are insured by HUD as well as mortgages that are held by HUD after assignment by the mortgagee. The plain language of the statute therefore forecloses petitioners' argument.

Nothing in the legislative history of the statute discloses "a clearly expressed legislative intent to the contrary." *Russello* v. *United States*, No. 82-472 (Nov. 1, 1983), slip op. 4 (citations omitted). The committee report cited by petitioners (Pet. 24-25) merely states that Congress intended to *include* mortgages *insured* by HUD, but nowhere provides that Congress also intended to *exclude* mortgages *held* by HUD. That report therefore fails to provide the "extraordinary showing of contrary intentions" necessary before the plain language of the statute may be disregarded. *Garcia* v. *United States*, No. 83-6061 (Dec. 10, 1984), slip op. 5; see also *Standefer* v. *United States*, 447 U.S. 10, 20 n.12 (1980) ("[i]t is not necessary for Congress in its committee reports to identify all of the 'weeds' which are being excised from the garden").[4]

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[4] Petitioners are wrong in asserting (Pet. 27-29, 35-38) that HUD shares their construction of the Act. Petitioners rely upon two items to support that claim: (1) a December 4, 1969, letter from HUD Acting Associate General Counsel John W. Kopecky to Assistant Attorney General William D. Ruckelshaus (Pet. App. 108a-110a); and (2) a June 10, 1980,

In fact, petitioners' efforts to read subsection (b)(2) out of the statute lead to peculiar results that Congress could not have intended. As the court of appeals recognized (Pet. App. 11a), the Act's underlying purpose is to prevent a mortgagor from diverting surplus income derived from a federally-insured housing project to his personal use. Unless a mortgage is extended or modified, HUD will reimburse the mortgagee and will be assigned the mortgage within 75 days of a default. 24 C.F.R. 207.258(a) and (b). Once HUD has acquired the mortgage, it will often attempt to recoup its loss by negotiating a repayment schedule with the mortgagor, as happened here (see Pet. App 5a-6a). Because HUD can at least partially recoup its losses from any surplus income that the mortgagor obtains from the project, Congress surely did not intend to permit the government to suffer a financial loss by the mortgagor's diversion of these funds to his own use. By protecting only the mortgagee and not HUD, petitioners' construction of the

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opinion by HUD General Counsel Jane McGrew (reproduced in part at Pet. 28, 35; reproduced in full at C.A. App. 1065-1090). Although the Kopecky letter states that the title of Section 239 of the National Housing Act and the Secretary's regulations implementing Section 239(a) refer to insured mortgages, the letter also specifically notes that, with respect to a criminal prosecution, "in [Section] 239(b)(2) the clause 'or is not otherwise covered by such regulation' might be construed to cover any diversion under a project mortgage after default" (Pet. App. 110a). The McGrew memorandum clearly states (C.A. App. 1087) that "Section 239(b) provides criminal penalties for misuse of project income in violation of implementing regulations, or, if the project is not covered by such a regulation, misuse of project income 'while such mortgage is in default.'" Accordingly, neither item supports petitioners' position.

statute would encourage a mortgagor to allow a mortgage to go into default in order to escape sanctions for his diversion of surplus income. Congress hardly intended to foster such an irrational result. Cf. *United States* v. *Bramblett*, 348 U.S. 503 (1955) (because Congress could not have intended to allow its own officers to be deceived, federal false statement statute, 18 U.S.C. 1001, applies to congressional offices as well as executive branch agencies).[5]

2. Petitioners also contend (Pet. 32-39) that, given the different interpretations of 18 U.S.C. 1715z-4(b)(2) adopted by different federal agencies, they necessarily lacked the specific intent to violate the statute. For several reasons, that contention lacks merit.

To begin with, as noted above (pages 6-7), Section 239(b)(2) makes it a crime for persons such as petitioners "willfully and knowingly" to divert surplus income from a federally-insured multifamily housing project while the project is in default. As the court of appeals summarized (Pet. App. 10a), "[t]he statute clearly states that if the loan is in default one may not use rent for any purpose other than meeting the actual and necessary expenses." The text of the statute thus defines the conduct that is made a crime "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discrimina-

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[5] While petitoners correctly note (Pet. 30-32) that one district court has accepted their position, *United States* v. *Capano*, Crim. No. 84-38-WKS (D. Del. Aug. 23, 1984), appeal pending, that affords no basis for review by this Court. The Fourth Circuit's decision in this case is the first appellate court ruling on the scope of 12 U.S.C. 1715z-4(b)(2), and the issue simply does not warrant this Court's consideration in the absence of a conflict among the circuits.

tory enforcement." *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983); see *Village of Hoffman Estates* v. *Flipside, Hoffman's Estates, Inc.*, 455 U.S. 489, 498 (1982). The statute itself thus clearly informed petitioners that diverting project funds to their own use after the mortgage had been assigned to HUD was forbidden.

Indeed, petitioners do not contend that the statute itself is vague. Rather, petitioners allege that HUD has concluded that the statute does not apply to mortgages held, rather than insured, by HUD (see page 7 note 4, *supra*), and that, given HUD's construction of the Act, they cannot be held criminally liable for diverting income from Shamrock Gardens. For three reasons, however, the premise of that argument is flawed.

First, as explained above, petitioners have overlooked those portions of the documents on which they rely in which HUD had taken the position that Section 239(b)(2) could reach mortgages held, rather than insured, by HUD (*ibid.*). Second, petitioners do not claim that they were personally aware of these documents or relied upon them in acting as they did. Accordingly, if the statute in fact proscribed their conduct with sufficient clarity, they cannot rely upon any administrative uncertainty as to its scope in order to avoid liability. See *United States* v. *Rogers*, No. 83-620 (Apr. 30, 1984), slip op. 9. Third, the district court found (Pet. App. 34a) that "[petitioners] cannot plead ignorance as to the propriety of their disbursements" because "HUD officials, both orally and in writing, informed [petitioners] on numerous occasions that they were not to use the rents or other funds of Shamrock Gardens for purposes other than the actual and necessary expenses of the

housing project." See also Pet. App. 5a. That finding, which petitioners do not challenge, wholly undermines their claim of uncertainty based upon HUD's supposed interpretation of the reach of Section 239(b)(2).

3. Petitioners also claim (Pet. 39-41) that 12 U.S.C. 1715z-4(b) is unconstitutional because it delegates to the Secretary of HUD the authority to promulgate regulations the violation of which is a crime under the statute. Petitioners lack standing to raise this insubstantial claim, however. Only subsection (b)(1) makes it a crime to divert funds in violation of a regulation issued by the Secretary; subsection (b)(2), as discussed above (pages 6-7), neither empowers the Secretary to promulgate regulations which, if violated, will constitute a crime nor refers to the Secretary's implementing regulations. In this case, both the indictment (Pet. App. 62a-84a) and the jury instructions (Tr. 1042-1052, 1054-1057) alleged that petitioners had violated subsection (b)(2), not subsection (b)(1) or its implementing regulations. Accordingly, petitioners may not challenge the constitutionality of a provision of Section 239(b) that was not applied to them. See *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

4. Finally, both petitioners contend (Pet. 41-46) that the government failed to prove that they had conspired to violate 18 U.S.C. 1001. Petitioner Norris also claims (Pet. 46-49) that the evidence was insufficient to show that he had made a material false statement. However, both the district court (Pet. App. 35a-39a, 49a-50a) and the court of appeals (*id.* at 12a-18a) found that the evidence was sufficient to support petitioners' convictions. Given these concurrent factual findings by both lower

courts, review by this Court of petitioners' fact-bound claims is unwarranted. See, *e.g.*, *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 8; *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[6]

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[6] Moreover, Count 1 of the indictment (see Pet. App. 62a-70a) charged petitioners with conspiring to violate both 12 U.S.C. 1715z-4(b)(2) and 18 U.S.C. 1001. The judgment of conviction on that count must therefore be sustained if the evidence was sufficient to support the finding that petitioners conspired to violate 12 U.S.C. 1715z-4(b)(2), regardless of whether the evidence was also sufficient to sustain the finding that petitioners conspired to violate 18 U.S.C. 1001. See *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985), slip op. 6 (citation omitted) (recognizing the "longstanding doctrine[] of criminal procedure" that " 'when a jury returns a verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged' "). Because petitioners do not contest the sufficiency of the evidence to support the finding that they conspired to violate the National Housing Act, petitioners' claim that the evidence failed to prove a different purpose of their scheme is immaterial.

In any event, the evidence was plainly sufficient to permit a reasonable jury to find that petitioners had conspired to make a false statement. Petitioners controlled the disbursement of all project income. The bookkeeper for the project was instructed not to write any checks on the account except for standard utility bills, in which case the bookkeeper was required to have one of the petitioners sign the check. Acting as managing general partner for Shamrock Gardens, petitioner Norris caused two checks totalling $650 to be issued from the Shamrock Gardens' account to purchase carpet for his own residence and that of a friend. Petitioner Silver, the comptroller for the apartment complex, listed these items as maintenance and decorating expenses for Shamrock Gardens in the financial records used by an accounting firm that HUD had hired to audit the project's financial statement. These expenditures were part of the total maintenance expenses listed in the Shamrock Gardens financial statement of

1978 (Pet. App. 15a, 38a-39a, 44a-45a). The jury thus could reasonably conclude from petitioners' business relationship and the means by which the $650 was disbursed and then disguised in the Shamrock Gardens' financial records that petitioners had agreed to conceal this expenditure from HUD.

Furthermore, petitioner Norris's false statement that the $650 was a legitimate Shamrock Gardens' expense was material for the purposes of 18 U.S.C. 1001. Under that statute, a statement is material if it is capable of influencing a governmental function; the government need not prove that the agency in fact relied upon the statement or that the agency suffered a monetary loss. See, *e.g.*, *United States* v. *Notarantonio*, No. 84-1294 (1st Cir. Mar. 29, 1985), slip op. 18-19; *United States* v. *Brack*, 747 F.2d 1142, 1150 (7th Cir. 1984), cert. denied, No. 84-1071 (Feb. 19, 1985); *United States* v. *Green*, 745 F.2d 1205, 1208 (9th Cir. 1984); *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983). At the time that the false statement was made, HUD was negotiating a repayment schedule with petitioners in an attempt to recoup some of its lost money. Had HUD known at that time that petitioners were diverting funds (regardless of the amount) from Shamrock Gardens, HUD undoubtedly would have terminated petitioners' control over the operation of the apartment complex in order to ensure that no further diversions took place. By falsely identifying the nature of the disbursements, petitioners deceived HUD with regard to the desirability of exercising its rights as holder of the Shamrock Gardens mortgage to prevent dissipation of the surplus income from the project. See *United States* v. *Notarantonio*, slip op. 18-22.

Finally, contrary to petitioner Norris's claim (Pet. 44-45), the fact that he was no longer the managing general partner at Shamrock Gardens at the time that the project's 1978 financial statement was submitted to HUD is immaterial. Section 1001 does not require that a false statement be made directly to the federal government, only that it is made in connection with a matter within the jurisdiction of a federal agency. See *United States* v. *Notarantonio*, slip op. 22-23 (collecting cases). Because HUD audited the apartment complex on the basis of the project's false financial reports, those reports clearly fell within the broad scope of 18 U.S.C. 1001. See *Notarantonio*, slip op. 22-23.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

THOMAS E. BOOTH
Attorney

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